No. 84-978 (11)

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

EXXON CORPORATION, et al.,
Appellants,

VS.

ROBERT HUNT, ADMINISTRATOR OF
NEW JERSEY SPILL COMPENSATION FUND, et al.,
Appellees.

On Appeal from the Supreme Court of the State of New Jersey

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AMICI CURIAE BRIEF OF STATE OF CALIFORNIA EX REL. JOHN K. VAN DE KAMP, ATTORNEY GENERAL THE STATES OF CONNECTICUT, OHIO, MAINE, NEW HAMPSHIRE, NEW YORK, TEXAS AND VERMONT

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Amici file this brief pursuant to Rule 36.4 of the Rules of the Supreme Court of the United States.

INTEREST OF AMICI CURIAE

Over the last decade, the nation has had its attention forcibly drawn to the risks associated with hazardous substances and wastes. Environmental contamination at Love Canal in New York, Times Beach in Missouri, and Stringfellow Acid Pits in California raised many concerns about the extent of toxic contamination in our country. Those concerns have been elevated into fears that the nation is aware of only the tip of the toxics iceberg, and that hazardous waste dangers, like the cancer they can cause, are multiplying at a seemingly uncontrollable rate.

In response, Congress passed the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA).[1] CERCLA created the federal Superfund to control releases of hazardous substances nationwide. Even as CERCLA was enacted, Congress realized that the federal Superfund would be adequate to address only a portion of the most seriously contaminated sites. Congress, therefore, relied upon the states to assume a substantial role in the mitigation of the nation's hazardous substance sites.

As of this writing, the United States' ability to collect taxes to support the federal Superfund will expire on September 30, 1985. Even assuming that Congress reauthorizes a new authority to tax after that date thereby maintaining the viability of Superfund, the states undoubtedly will be required to assume financial responsibility for hazardous substance cleanups. It is critical for this Court

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[1] "CERCLA" means the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601 et seq., enacted by Congress on December 11, 1980. "Superfund" is the Hazardous Substance Response Fund established by section 221 of CERCLA, 42 U.S.C. § 9631. "Spill Fund" means the New Jersey Spill Compensation Fund established pursuant to N.J. Stat. Ann. section 58:10-23.11i (West 1982) as part of the New Jersey Spill Compensation and Control Act. N.J. Stat. Ann. Section 58:10-23.11 et. seq. (West 1982) enacted on January 6, 1977 and thereafter amended.

to affirm the ability of the states to raise funds to support those cleanup efforts.

In 1981 the State of California created a state fund to complement and supplement the federal Superfund.[2] This state fund, known as the Hazardous Substance Account (HSA)[3] is generated primarily by a tax on persons who dispose of hazardous waste within the State of California.[4]

As will be explained below, the tax to support the California program is different from the tax used to support both the New Jersey Spill Fund and the federal Superfund, however, the authorized uses of the HSA are similar.[5] HSA, upon appropriation by the State Legislature, may fund administrative costs, hazardous substance response equipment costs, costs of preparation for response to a hazardous substance release, removal and remedial action costs incurred by the State,[6] costs of certain specified studies, and the state share of remedial action costs mandated pursuant to section 104(c)(3) of CERCLA, 42 U.S.C. § 9604(c)(3). Money in HSA may also be appropriated by the

[2] The Hazardous Substance Account Act, California Health and Safety Code sections 25300-25382 (West 1984 & Supp. 1985).

[3] California Health and Safety Code section 25330. This account is administered by the director of the California Department of Health Services.

[4] See generally California Health and Safety Code section 25340-25348. The HSA is funded by a tax imposed annually upon persons who dispose of hazardous and extremely hazardous waste over a specified amount in the state. The tax rate is based upon the total amount in tons of waste disposed of during a one-year period. See California Health and Safety Code section 25347.

[5] See California Health and Safety Code section 25351, which requires that the expenditures from HSA be consistent with section 114(c) of CERCLA, 42 U.S.C. § 9614(c).

[6] The State of California generally adopts the definitions in CERCLA for "remedy or remedial action" (42 U.S.C. § 9601(24)) and "remove or removal" (42 U.S.C. § 9601(23)). See California Health and Safety Code sections 25322, 25323.

state legislature on a site specific basis for the costs of restoring, rehabilitating, or replacing natural resources, and of assessing short-term and long-term injuries to natural resources to the extent such costs are not reimbursed pursuant to CERCLA.[7] Finally, HSA may be used to compensate victims for uninsured out-of-pocket medical expenses and uninsured actual lost wages, business income, or injury to a person's property,[8] compensation provisions which have no equivalent under CERCLA.

On November 6, 1984, the electorate of the State of California passed the Hazardous Substance Cleanup Bond Act of 1984.[9] As a consequence, the state hazardous substance account was increased to fifteen million dollars ($15,000,000) annually with five million dollars ($5,000,000) from the account dedicated to repay in part the principal of, and interest on, the bonds sold under the Hazardous Substance Cleanup Bond Act.

[7] See California Health and Safety Code section 25352.

[8] See generally California Health and Safety Code sections 25370-25382.

[9] That act empowered the sale of general obligation bonds to create a Hazardous Substance Cleanup Fund of up to one hundred million dollars ($100,000,000) to pay (1) the state share of costs of removal and remedial action pursuant to section 104(c)(3) of CERCLA, and (2) all costs of removal or remedial action on sites on the State Priority Ranking List (SPRL). (See California Health and Safety Code Sections 25385-25386.6)

In order to spend HSA funds and/or bond funds for removal or remedial actions at a site, the state must first place this site on the SPRL. (See California Health and Safety Code section 25385.6.) There are currently 222 sites on the SPRL. Of those sites, 53 are also listed or proposed to be listed on the National Priority List. The State of California has executed three cooperative agreements and three contracts with the United States Environmental Protection Agency pursuant to Section 104 of the CERCLA, 42 U.S.C. § 9604 for work on the NPL sites in California.

Other amici joining in this brief administer similar programs for the cleanup of hazardous substance sites.[10] These states are committed to expeditiously cleaning up sites contaminated by hazardous substances to protect the public health and safety of their citizens. A broad ruling in favor of appellants' position could eliminate or deeply erode a state's ability to tax hazardous waste to support its cleanup funds and thereby jeopardize its ability to respond to hazardous substance contamination problems.

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[10] The State of New York also maintains a hazardous waste remedial fund created pursuant to New York State Finance Law, Section 97-b. The Fund is made up of monies collected pursuant to special assessments on generators of hazardous waste and monies collected from penalties against violators of certain sections of the New York State Environmental Conservation Law. To date, New York has identified approximately 1400 hazardous waste sites within the state, only a fraction of which are being addressed by the federal government with Superfund money. The existence of the hazardous waste remedial fund has enabled New York to begin a major program of site investigation and remediation. Without the State fund, New York would not be able to adequately address its hazardous waste problem.

The State of New Hampshire manages the New Hampshire Hazardous Waste Cleanup Fund which was established in 1981. The fund is supported by a fee imposed on industry based upon the amount of hazardous waste generated in the state. (N.H. Rev. Stat. Ann. 147B:8(I) (Supp. 1983).) The fund was established for the broad purpose of providing for the adequate and safe containment of and cleanup of hazardous waste sites in the State of New Hampshire. In 1985, the New Hampshire Legislature restricted the use of the fund to sites which do not qualify for CERCLA funds. (N.H. Rev. Stat. Ann. 147B:6(I) (Supp. 1983) as amended by Chap. 346 of the 1985 N.H. Laws). State matching funds for CERCLA are derived from the sale of a special bond (Chap. 346:4 of the 1985 N.H. laws). No claims payable to third parties out of the Hazardous Waste Cleanup Fund are authorized. (N.H. Rev. Stat. Ann. 147-B:6(II) (Supp. 1983).)

The State of Vermont manages a response fund pursuant to 32 V.Stat. Ann. Chap. 237 "Tax on Hazardous Waste Generation."

SUMMARY OF ARGUMENT

When Congress adopted CERCLA, it set forth a comprehensive scheme designed to guide federal and state responses against the uncontrolled releases of hazardous substances to protect public health and welfare and the environment.

CERCLA established a two-pronged approach for the accelerated cleanup of hazardous substances throughout the nation.

First, CERCLA established a federal fund to be used directly by the United States Environmental Protection Agency (EPA) to take cleanup actions at the most seriously contaminated hazardous substance sites in the nation, and to make other specified payments for claims to the Superfund. The large majority of Superfund expenditures require a specified contribution by a state in order to commence cleanup of a particular site.

Second, CERCLA created liability standards for certain categories of parties responsible for hazardous substance contamination and established a cause of action for recovery of abatement costs from those parties. In so doing, Congress created a powerful mechanism for states and the federal government to rapidly expend public funds to protect the public health and welfare and the environment with the expectation of eventually recovering those costs from responsible parties.

In creating this approach, Congress clearly looked to the states to provide substantial funds to undertake appropriate response actions. State funding is necessary to provide the state share required for federal Superfund expenditures at a specified site. The states also are relied upon to fund response action at sites which may not be addressed with Superfund money. Congress recognized state response funds would be essential to the abatement of hazardous substances because federal Superfund would be inadequate to pay for cleanup at all sites requiring abatement. There is no evidence that Congress desired in any way to limit the ability of states to raise funds for such purposes.

Congress did place a restriction on the use of state funds for other than state response costs. Section 114(c) of CERCLA, 42 U.S.C. § 9614(c) expressly prohibits states from requiring per-

sons to contribute to funds to pay claims for damages or costs of response by third parties or for other compensable items under CERCLA. In creating those categories of limitations, however, Congress intended to preempt state taxation only where the funds raised are to be used to compensate claims already paid for by Superfund. In any event, Congress did not intend to preempt state taxation systems which were not duplicative of the CERCLA system.

We adopt the general reasoning employed by the New Jersey Supreme Court as it enunciated an "actual compensation" test to determine the validity of a state compensation fund. We have recast the court's reasoning, however, in a moderately revised framework.

ARGUMENT
I

THE FORMATION OF STATE CLEANUP FUNDS WAS AN ESSENTIAL ELEMENT OF THE COMPREHENSIVE FEDERAL-STATE SCHEME EMBODIED IN CERCLA

Amici submit that a comprehensive review of CERCLA and its legislative history compels the conclusion that state cleanup funds are permitted and, in fact, are encouraged by the federal legislation.

A. Congress Recognized That States Would Need Their Own Funds To Abate Hazardous Substance Sites

In considering the need for federal legislation to address the problems of improperly managed hazardous waste, Congress observed that:

> "Since enactment of [the Resource Conservation and Recovery Act of 1976], a major new source of environmental concern has surfaced: the tragic consequences of improperly, negligently, and recklessly hazardous waste disposal practices known as 'the inactive hazardous waste site problem.' The unfortunate human health and environmental consequence of these practices has received national attention amidst growing public and Congressional concern over the

> magnitude of the problem and the appropriate course of response that should be pursued. Existing law is clearly inadequate to deal with this massive problem." (H.R. Rep. No. 1016, 96th Cong., 2d Sess. 18 (1980), reprinted in 1980 U.S. Cong. Ad. News 6120.)

In an effort to address concerns such as those, Congress enacted CERCLA. The legislation established a $1.6 billion Superfund, which is financed primarily by a federal tax on petroleum and specified chemicals. The principal use of the fund is to provide the federal share of public monies for removal[11] or remedial[12] actions directed against releases or threatened releases of hazardous substances to the environment. The remainder of the public monies for remedial measures at a site must be provided by the states in proportions specified by CERCLA. Additionally, Superfund can be used for certain governmental costs and for the payment of two types of claims. (See 42 U.S.C. § 9611.)

As part of the CERCLA legislation, Congress required the amendment of the National Contingency Plan (NCP) created by section 311 of the Federal Water Pollution Control Act, 33 U.S.C. § 1321 to set forth procedures for responding[13] to hazardous substance releases. (See 42 U.S.C. § 9605.) A component of the NCP is the National Priorities List (NPL). (See 42 U.S.C.

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[11] Removal action refers to emergency or crisis measures including "spill containment measures; measures required to warn the public of, and protect it from acute damages; temporary evacuation and housing; [and] activities necessary to close an existing public water supply system." (S.Rep. No. 848, 96th Cong., 2d Sess. 53-54 (1980). *See* 42 U.S.C. § 9601(23).)

[12] Remedial action deals with "those actions consistent with permanent remedy . . . to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment." (42 U.S.C. § 9601(24).)

[13] See 42 U.S.C. § 9601(25). "Respond" or "response" are generic terms referring to a broad range of actions which mitigate or abate hazardous substance contamination.

§ 9605(8)(B).) The NPL is a list of sites contaminated by hazardous substances which appear to present the most significant threat of harm to human health in the nation. (See 40 C.F.R. § 300.68(a).) Once a site has been placed on the NPL, the federal government may arrange for remedial activities at the site with financing from Superfund. (See 42 U.S.C. § 9604.)

Despite the size of Superfund, Congress was aware that it was inadequate to address every site in the nation requiring cleanup. At the time of CERCLA's passage the EPA, manager of the Superfund, estimated that as many as 30,000 to 50,000 inactive and uncontrolled hazardous waste sites existed in the United States, and estimated that cleanup of the most dangerous sites alone would cost between $13.1 and $22 billion (H.R. Rep. No. 1016, 96th Cong., 2d Sess. 18, 20, (1980), reprinted in 1980 U.S. Cong. Ad. News 6120, 6123). Congress recognized that Superfund would not provide for a sufficient level of funding to handle the cleanup and removal of hazardous waste sites that existed at the time. (See *Exxon v. Hunt*, 481 A.2d 271, 279 (N.J. 1984); see generally 126 Cong. Rec. S/15007 (daily ed. Nov. 24, 1980) remarks of Sen. Stafford; S.Rep. No. 848; 96th Cong., 2d Sess. 17, 71 (1980).) As a consequence, Congress looked to maximize the use of Superfund by requiring supplemental funds from the states for specified actions. In addition, Congress intended to provide enhanced legal authority to the states pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607 to enable them to respond independently to sites which would not be addressed by the limited federal funds. Clearly, in both cases Congress envisioned the creation of state cleanup funds.

1. State Response Funds Are Required For Redmedial Actions Under Section 104 Of CERCLA

State involvement is critical in the initiation of remedial actions under section 104 of CERCLA, 42 U.S.C. § 9604. Section 104(c) of CERCLA prohibits actions unless the state in which the release occurs first enters into a contract or cooperative agreement providing assurances that (1) the state will assure all future maintenance of the removal and remedial action; (2) the state will assure availability of an acceptable hazardous waste

disposal facility, if necessary; and (3) the state will pay either 10 percent of the cost of the remedial action (including all future maintenance) or, in the case of a facility that the state or political subdivision owned at the time of the disposal, at least 50 percent of any sums expended in response to a release at such a facility. (See 47 Fed. Reg. 31186 (1982).) In recognition of the necessity of state contributions for cleanup actions, the states' ability to raise funds for those purposes was intended to be unaffected by the passage of CERCLA. (See 126 Cong. Rec. S14981 (daily ed. Nov. 24, 1980) (remarks of Sen. Randolph.))

2. State Response Funds Are Permitted For Response Actions At Sites For Which Federal Funds Cannot Or Have Not Been Used

As encouragement for states to undertake remedial actions with their own funds, CERCLA specifically entitled states to initiate cost recovery actions against specified parties for those expenditures. By authorizing state action for cost recovery and natural resources damages, section 107 of CERCLA provides the states with an essential tool to respond to sites which have not been or may never be addressed with Superfund money. (See *New York v. General Electric Company*, 592 F.Supp. 291 (N.D.N.Y. 1984)

In order to recover response costs under Section 107 of CERCLA, the federal or state response action must not be inconsistent with the NCP. The NCP provides a comprehensive guidance for the identification, investigation and remedy of hazardous substance releases. The NCP is the national blueprint detailing on a flexible basis the methods for achieving the goal of CERCLA which is protection of public health and welfare and the environment. It was through the creation of the NCP, not the creation of Superfund, that Congress intended to impose the comprehensive federal-state scheme alleged by appellants. (*New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985.) If the states followed the NCP then cleanup actions would follow a consistent, nationwide pattern. By providing the cost recovery component in CERCLA, Congress set forth a strong incentive—a carrot rather than

a stick—for the states to implement the cleanup guidelines of the NCP.

The NCP not only provides an overall methodology on how best to clean up sites; it embodies the Congressional reliance on state cleanup actions. Through the NCP, EPA has interpreted CERCLA to provide states with a substantial and oftentimes independent role for undertaking hazardous substance response actions.

As an example of this federal reliance, a major new section of the NCP was added in subpart F (40 C.F.R. §§ 300.61-300.71). This subpart established seven phases of response, from discovery of the release of hazardous substances through various levels of response to documentation of response for cost recovery purposes. The phases are designed to give response personnel a decision-making framework for undertaking response action. (See 47 Fed. Reg. 31198 (1982).) As part of this action, EPA added a new 40 C.F.R. § 300.62 to describe the State role under CERCLA. EPA stated that it "decided to add this section to emphasize the ability of the States to undertake responsibility for much of the response detailed in Subpart F." (47 Fed. Reg. 31199 (1982).)

Furthermore, the NCP specifically provides that:

> "States are encouraged to use State authorities to compel potentially responsible parties to undertake response actions, or to *themselves undertake response actions which are not eligible for Federal funding.*" (Emphasis added.) (40 C.F.R. section 300.24(c).)

The court should afford great weight to an agency's interpretation of its governing statute. Within the past year, this Court twice has applied this fundamental maxim of statutory construction in upholding interpretations by EPA of federal environmental statutes. See *Chemical Manufacturer's Association v. National Resources Defense Council,* ____ U.S. ____, 105 S.Ct. 1102 (1985), *Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* ____ U.S. ____, 104 S.Ct. 2778 (1984).[14]

[14] While reviewing a challenge to EPA's position regarding the granting of variances from pollution discharge requirement established under the federal Clean Water Act (33 U.S.C. § 1251 et seq.) this Court in *Chemical Manufacturers Assoc.* stated:

> "This view of the agency charged with administering the statute is entitled to considerable deference; and to sustain it, we need not find that it is the only permissible construction that EPA might have adopted but only that EPA's understanding of this 'very complex statute' is a sufficiently rational one to preclude a court from substituting its judgment for that of EPA." [105 S.Ct. at 1108.]

The ability of the states to pursue a cost recovery action under 107(a)(4)(A) of CERCLA is separate and independent of the requirements of any other CERCLA sections, including section 104. (See *United States v. Northeastern Pharmaceutical & Chemical Company,* 579 F.Supp. 823 (W.D. Mo. 1984); *United States v. Reilly Tar & Chemical Company,* 546 F.Supp. 1100, 1118 (D. Minn. 1982).) CERCLA, therefore, authorizes state actions to recover costs even where such costs were not incurred as part of a contract or cooperative agreement pursuant to section 104 of CERCLA.

By requiring national guidelines for response actions and providing clear legal authority to the states to recover the costs of their response actions, Congress envisioned the broad use of State-created response funds. The use of such funds may be independent of federal funds, without EPA supervision and at sites not on the National Priorities List and still be consistent with the aims of Congress. (See *New York v. Shore Realty,* 759 F.2d 1032, 1046-1047 (2d. Cir. 1985); *New York v. General Electric,* 592 F.Supp. 291, 303-304 (N.D.N.Y. 1984).)

B. Exxon Fundamentally Misunderstands The Federal-State Relationship Contemplated by CERCLA

While appellants recognize that CERCLA envisions a coordinated federal-state scheme to address hazardous substance problems, they misapprehend the full nature of the response scheme. They unduly restrict their focus to the creation of the Superfund and the means by which it is spent in conjunction with matching state contributions. In doing so, appellants erroneously imply that states can only spend response funds on National

Priority List sites and even then only in the context of section 104 of CERCLA. This is patently incorrect.[15]

Nothing in CERCLA supports appellants' contention that states cannot clean up sites on the NPL entirely with state funds if they so desire. States can certainly refuse to enter into cooperative agreements or contracts with EPA as called for by section 104 of CERCLA. In such a situation, EPA would be unable to proceed with a remedial action. Whether a site on the NPL

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[15] Appellants' confusion over the purposes of CERCLA is evident in their discussion of the role of state funds to pursue cleanup (App. Br. at 20, 21). On the one hand they state that:

> "[i]f states were permitted to create their own special funds for the purpose of financing cleanup at Superfund-eligible sites within the State, they would circumvent the coordinated State-federal procedure and priorities of CERCLA—for example, by relying upon their own funds to pursue cleanup through their own unsupervised procedures and refusing to enter into the cooperative agreements with EPA required by Sections 104(c) and (d) as a precondition to governmental action under Section 104."

On the other hand they state that "Congress did not prohibit the States from using general revenues . . . to create such funds for cleanup." Thus, according to appellants, Congress intended to preclude independent state actions—to require coordinated federal-state procedure—but only in instances involving "special" state funds, not in cases involving "general" funds. The alleged problems described in their first statement regarding State-controlled funds are cured by their second statement. If their first statement were correct, the source of the funds would be irrelevant since it is States' ability to have their own cleanup funds which is the perceived problem.

Furthermore, appellants' contend that if states were limited to general revenues to finance their own cleanup efforts they would have a greater incentive to "participate in CERCLA" and to coordinate their actions with the federal government. While it is unclear what appellants mean by "participate in CERCLA" it makes no sense that the source of state cleanup funds should affect the State's desire to enter into cooperative agreements or contracts pursuant to section 104 of CERCLA. The fact that section 104 provides for federal funding of up to 90% of specified remedial costs on NPL sites acts as a powerful incentive for states to work with EPA at sites eligible for federal funding irrespective of the source of state funds for the state share.

becomes the subject of a publicly-financed remedial action is largely dependent on whether the state, not EPA, can contribute the necessary remedial share and provide other specified assurances. The New Jersey Supreme Court correctly noted that the underlying scheme of Superfund is one that "allows, but does not require, cooperation of the federal and state regimes." (*Exxon v. Hunt,* 481 A.2d at 280, citing the Tax Court, 4 N.J. Tax at 315.)

The United States Court of Appeals, Second Circuit also has observed that:

> "Congress did not intend listing on the NPL to be a prerequisite to all response actions. Neither the earlier House nor Senate version included the NPL [National Priorities List] in the NCP [National Contingency Plan] [citations omitted]; although the Senate version limited joint federal-state responses to sites on the NPL [citations omitted]. It is also instructive to note that the Senate Report described the NPL as serving 'primarily informational purposes, identifying for the States and the public those facilities and sites or other releases which appear to warrant *remedial actions*.' (emphasis added). In reviewing the changes made by the compromise, no one mentioned that NPL listing would be a requirement for removal action or even a general requirement under the NCP." (*New York v. Shore Realty Corp.,* 759 F.2d 1032, 1047 (2d Cir. 1985.)

Appellants further contend that any site on the NPL can be cleaned up with public funds only if federal Superfund money is spent on the site and that to the extent that state funds are required to initiate a remedial action at the site, those funds can only be from general revenue sources. This position ignores Congress' recognition that a federal Superfund would not be able to address all sites that require remedial action nor even address the limited number of sites designated on the National Priorities List.

Appellants argue that the states are barred by CERCLA from having any special state funds whose purpose is to clean up "Superfund-eligible" sites. Nowhere in its brief, however, has appellant attempted to articulate what a Superfund-eligible site is.

Appellant has avoided definition because to do so would highlight the fallacies of its argument.

Assuming arguendo that such a definition is possible, a "Superfund-eligible" site could refer to any site which is, or may be on the NPL. The first NPL was proposed by EPA on December 30, 1982 (see 47 Fed. Reg. 58476 (1982)), over two years after the passage of CERCLA. The first final NPL was issued as a rule in September 1983 and included 406 sites (see 48 Fed. Reg. 40658 (1983)). The NPL is required to be revised at least once annually. At present 538 sites are on the list and 248 additional sites are proposed for inclusion. It is estimated that, on the basis of its current criteria, between 1,400 and 2,200 sites will ultimately be added to the NPL.[16] Any site in the United States which has suffered a release of hazardous substances to the environment has the potential to be added to the NPL. If all such sites are "Superfund-eligible," then no state could create funds to respond to those releases.

Even if actual listing on the NPL is the criteria for "superfund-eligibility," there are problems in application that Congress could not have intended. First, the delay in promulgating the NPL would have prevented any site action for almost three years. Second, the NPL is a dynamic document and will undoubtedly include new sites. How will a state know whether a site which is currently not on the NPL eventually be included? Under the theory advanced by appellants the jeopardy to a state-financed cleanup is obvious. A state could be using its funds to address a site not on the NPL at the time and, therefore, not eligible for federal funding. As soon as the site was included on the list, the state would be required to cease using its own funds on the site until it entered into a cooperative agreement or contract with EPA pursuant to section 104 of CERCLA. EPA, however, while listing the site on the NPL, may not have any federal funds currently available to devote to the site. Thus, ironically, where some work could have taken place on the site, it would now be

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[16] Letter to James Florio from United States General Accounting Office, *Status of EPA's Remedial Cleanup Efforts,* March 20, 1985.

barred. In short, the goal of CERCLA—that the health and welfare be protected—would be stymied.

Because the logical outcome of appellant's theory contravenes the primary goal of CERCLA it should be rejected in total. State cleanup funds were not barred by CERCLA; they were, in fact, counted upon to address hazardous substance problems that could not or would not be remedied with federal monies.

II

CERCLA DOES NOT PREEMPT STATE FUNDS WHICH ARE USED FOR RESPONSE ACTIONS

Appellants erroneously argue that section 114(c) of CERCLA, 42 U.S.C. § 9614(c) preempts special State funds which finance any cleanup costs or damages which are eligible for, though never actually compensated by, federal Superfund. Appellants err because they ignore the plain language of section 114(c) and its legislative history which provides for State funding of a broad range of activities including response actions at sites both on and off the NPL.

A. Only Those State Funds Which Pay "Claims For Compensation" Are Subject to the Section 114(c) Test For Preemption

1. The Plain Language of Section 114(c) Prohibits Only A Limited Class Of State Activities

As required by the general principles of statutory construction and federal preemption, the starting point for interpreting a statute is with the words of the statute itself. (See *Consumer Products Safety Commission v. GTE Sylvania, Inc.,* 447 U.S. 107, 108, (1980).) Section 114(c) states in pertinent part:

> "Except as provided in this chapter, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this subchapter."

On its face, section 114(c) expressly prohibits two categories of uses for which state funds could not be used.[17] The first is "to pay compensation for claims of any costs of response or damages." The second is to pay compensation for ". . . claims which may be compensated under this subchapter."

There is a definite limitation on the reach of this prohibition. The term "compensation for claims" has a narrowing effect so that many state uses of its own funds are not affected. The preemption set forth in section 114(c) is for a very limited category of state activities.

The term "claim" is defined in Superfund as a "demand in writing for a sum certain" (42 U.S.C. § 9601 (4)). The term "compensation" is not defined by the statute but is customarily used to mean "indemnification; . . . making whole; giving an equivalent or substitute of equal value[;] [t]hat which is necessary to restore an injured party to his former position." *Black's Law Dictionary* 256 (5th Ed. 1979); see also *Webster's Third New International Dictionary* 463 (1976). The terms "claim" and "compensation" as used in Superfund are related; Superfund defines a "claimant" as any person who presents a *claim* for *compensation* under this chapter. (42 U.S.C. § 9601(5) (emphasis added).)

Elsewhere in CERCLA, Congress drew a distinction between "compensation for claims" and other types of government expenditures for removal or remedial action. In section 111(a) of

[17] The Solicitor General of the United States submitted an amicus curiae brief which addressed whether this Court should note probable jurisdiction. In that brief, the Solicitor General took a different position from either of the parties or the New Jersey Supreme Court. He argued that there was a preemptive purpose to section 114(c) but that it was limited to "claims for compensation" only. Under his analysis the payment by a State fund of cleanup expenses incurred by the state is permissible under section 114(c) since it is not "compensation" for a "claim" as those terms are used in CERCLA. The Solicitor General declined to adopt the "actual compensation test" articulated by the New Jersey Supreme Court. Our initial argument borrows heavily from the Solicitor General's brief.

CERCLA, 42 U.S.C. § 9611(a), there are four specified uses of Superfund. Two of the permitted uses of Superfund money are described as the "payment" of "claim[s]." (Sections 111(a)(2) and (3), 42 U.S.C. §§ 9611(a)(2) and (3).) Both involve written demands either for damages or reimbursement for monies spent in response (Sections 111(a)(2) and (3), 42 U.S.C. §§ 9611(a)(2) and (3)). The other two permitted uses of Superfund money involve expenditures made without such a written demand for damages or reimbursement. (Sections 111(a)(1), (4), 42 U.S.C. §§ 9611(a)(1) and (4).) These are *"payment of governmental response costs"* (Section 111(a)(1), 42 U.S.C. § 9611(a)(1)—*i.e., payments made for the cleanup or removal of hazardous substances or for remedial action—and payments for necessary studies, investigations, equipment, and employee health* (Section 111(a)(4), 42 U.S.C. §§ 9611(a)(4).)

"Claims," therefore, has an express and definite meaning within CERCLA. The term does not have a general, imprecise use nor is it synonymous with costs incurred for a cleanup or response actions undertaken by a federal or state entity.

2. The Legislative History is Consistent With The Plain Language of the Statute

Section 114(c) was inserted as a floor amendment during the waning hours of the Congressional session. As a consequence, there are no committee reports or other legislative documents to demonstrate conclusively the intended use of the provision. The chronological development of the legislative proposals that eventually became CERCLA have been exhaustively detailed by the appellants and appellees.[18] All parties, including the New Jersey Supreme court, have identified as particularly significant the

[18] CERCLA was the product of last-minute compromise between competing House (*H.R. 85,* 96th Cong., 1st Sess. (1979), 126 Cong. Rec. H9, 186-201 (daily ed. Sept. 19, 1980) and *H.R. 7020,* 96th Cong., 2d Sess. (1980), 126 Cong. Rec. H9, 437-48 daily ed. Sept. 23, 1980) and Senate (*S. 1480,* 96th Cong., 1st Sess. (1979), 126 Cong. Rec. S14, 938-48 (daily ed. Nov. 24, 1980)) bills, and carried virtually no direct legislative history.

colloquy between Senator Bradley of New Jersey and Senator Randolph, Chairman of the Environment and Public Works Committee, which preceded the enactment of the bill that became Superfund. (See 126 Cong. Rec. S 14941-15008 (daily ed. Nov. 24, 1980).) The parties recognize that because Senator Randolph was chairman of the committee which reported the Superfund bill to the Senate, as well as floor manager and cosponsor of the measure, his explanations and commentws with respect to the interpretation of Superfund provisions deserve particular deference. (*Exxon v. Hunt,* 481 A.2d 271, 277 (N.J. 1984); see also *Mastro Plastics Corp. v. National Labor Relations Board,* 350 U.S. 290 (1956); *National Woodwork Manufacturers Assoc. v. National Labor Relations Board* 386 U.S. 612, 740 (1957); *Federal Energy Administration v. Algonquin SNG, Inc.* 426 U.S. 548, 564-567 (1976).)

The discussion between Senator Bradley of New Jersey, who was concerned about the survival of the very state fund addressed in this case, and Senator Randolph provides a strong demonstration that the reach of the preemption clause was intended to be limited to "compensation for claims" as is in the phrase's customary, literal sense. The Senators' discussion was as follows:

> "MR. BRADLEY: * * * Am I correct in understanding that it is the purpose of this legislation to prohibit States from requiring any person to contribute to a fund *for the purpose of reimbursing claims already provided for in this legislation?*
>
> "MR. RANDOLPH: Yes, that is the clear intent. The purpose is to prohibit States from creating duplicate funds to pay *damage compensable under this bill.*
>
> "MR. BRADLEY: *However, there is no such preemption of a State's ability to collect such taxes or fees for other costs associated with releases that are not compensable damages as defined in this legislation.*
>
> "MR. RANDOLPH: The Senator is correct.
>
> "MR. BRADLEY: There is nothing in the language or intent of this bill which would prohibit a State from *responding to a release* either under agreement with the Secretary, at the direction of the Federal on-scene coordinator or in the absence of timely response by any other party. In fact, the Federal Government's cleanup and containment capability is viewed as something of an appeal of last resort in the absence of any other adequate and timely response, if my understanding is correct.
>
> "MR. RANDOLPH: Yes, the Senator understands the intent of the bill correctly. * * *" (Emphasis added; 126 Cong. Rec. S 14981 (daily ed. Nov. 24, 1980)

After S. 1480 was passed by the Senate and its language was substituted for that in the House bill (H.R. 7020, 96th Cong., 1st Sess. (1979), Representative Florio, the sponsor of the House bill, observed:

> "Regarding the preemption language contained in these amendments, I would point out that some States, including my own State of New Jersey, have successful spill funds and that while States may not create duplicate funds *to pay damages compensable under this bill, there is no preemption of the States's ability to collect taxes or fees for other costs associated with releases that are not compensable damages as defined in this legislation.* It is also intended that State funds can be used to provide the required 10-percent State match." (1 Library of Congress, Senate Comm. on Environment and Public Works, 97th Cong., 2d Sess., *A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund), Public Law 96-510,* at 780 (Comm. Print 1983).)

Given this history as well as the plain meaning of the terms we must concur with the Solicitor General that section 114(c) preempts, as a general matter, only a category of payments made in response to formal demands in writing upon a state fund by parties seeking to be made whole for damages or costs or other actions compensable under CERCLA for the release of a hazardous substance.

B. State Funds Which Pay "Compensation For Claims" Are Preempted Only If Federal Superfund Has Actually Paid Compensation For The Same Claim

Thus far, amici have generally adopted the argument of the Solicitor General as to the scope of 114(c) preemption provision. The Solicitor General takes the position that funds used by the states to pay "compensation for claims" which are damages or costs attributable to the release of a hazardous substance or other use which may be compensated, are preempted. The Solicitor General requires no further inquiry into the type of damage or cost which a state fund seeks to reimburse as a claim. The Solicitor General finds that one of the two uses of the New Jersey Spill Fund—the payment of other parties' damages and cleanup costs—constitutes the payment of "compensation for claims" within the meaning of section 114(c) of Superfund.[19]

At this point, amici must depart from the Solicitor General's position. While we believe that section 114(c) clearly preempts, as a category, "compensation for claims" the language is less clear as to the extent of the preemption. The legislative history indicates that Congress intended to prohibit use of funds to pay claims for compensation only to the extent that such claims were already paid for by Superfund. Therefore, we agree with the reasoning of the New Jersey Supreme Court that state funds are not preempted by section 114(c) insofar as the state funds compensate claims that are either not covered or not actually paid under Superfund. Review of the applicable law and relevant legislative history of CERCLA supports this view.

In addressing the question of whether federal law confers a power that is not exercisable by states—the payment of compensation for specified claims—the Supremacy Clause (U.S. Const., art. VI, cl. 2) requires a judicial determination of whether application of state legislation frustrates the full effectiveness of federal law. (See *Perez v. Campbell*, 402 U.S. 637, 657 (1971).) As recently stated in pending hazardous waste litigation:

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[19] We agree with the Solicitor General's observation that the only "damages" which may be affected by section 114(c) are "natural resource damages."

> "Thus, analysis must proceed in two stages: first, an examination of the primary purposes of each of the laws at issue; second, a determination whether state law is an obstacle to the effectuation of federal objectives." (*Matter of Quanta Resources Corp.*, 739 F.2d 912, 915 (3d Cir. 1984), cert. granted, 53 U.S.L. Week 3584 (Feb. 19, 1985).)

Furthermore, as noted by the New Jersey Supreme Court, "it is not a question of 'whether purposes of the two laws are parallel or divergent,' but 'whether both regulations can be enforced without impairing the federal superintendence of the field . . . ' [citation omitted]" (*Exxon v. Hunt*, 481 A.2d 271, 275 (N.J. 1984). Where it argued, as it is in this case, that Congress intended to withdraw a power from a state by enacting a federal scheme, that intention must be explicit. (*Penn Terra Ltd. v. Department of Environmental Resources*, 733 F.2d 267, 272 (3d Cir. 1984).)

In this case, the Congressional intention to prevent the states from using their own funds to pay any compensation for certain specified claims is not explicit.

As described earlier in this brief, the colloquy between Senators Bradley and Randolph demonstrated that section 114(c) was intended to have very limited preemptive effect on existing and future state funds. Furthermore, the discussion also demonstrated that state funds could be used for purposes including the payment of "compensation for claims" that were either not covered or not actually paid under Superfund.

> "MR. RANDOLPH: * * * What this bill does is prohibit a State from requiring any person to contribute to any fund if the purpose of that fund is to compensate for a claim paid under the provisions of this bill.
>
> * * * * *
>
> "Putting it simply, this is a prohibition against double taxation for the same purposes. It is not a prohibition on the uses that a State may make of its money, nor does it prohibit a State from imposing fees or taxes for other purposes connected with cleanup or restoration activities such as the

purchase of pollution abatement equipment or the hiring or training of personnel for pollution prevention programs.

"In summary, Mr. President, this preemption provision is narrow in scope and limited to the particular purpose of preventing double taxation.

"* * * * *

"MR. BRADLEY: And am I also correct in noting that State funds are preempted *only for efforts which are in fact paid for by the Federal fund and that there would be no preemption for efforts which are eligible for Federal funds but for which there is no reimbursement?*

"MR. RANDOLPH: That is correct."

(Emphasis added; 126 Cong. Rec. S 14981 (daily ed. Nov. 24, 1980).)

Senator Randolph's statements, which addressed funds created subsequent to the passage of CERCLA[20] and would enable states to tax to compensate claims not actually compensated under Superfund, comports with a prohibition against double taxation in that states are still prevented from taxing to pay for claims actually financed by the federal government.[21]

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[20] Appellants' suggestion that the reference point for this critical dialogue between Senators Randolph and Bradley were state funds in existence prior to CERCLA is unsupportable. They had finished their discussion of existing funds and were focused on newly financed funds. Furthermore, Senator Bradley would not have noted that "State funds are preempted only for efforts which are in fact paid for by the Federal fund" if he were referring to an existing fund. Such funds would have already received their contributions prior to CERCLA and no tax conflict could have arisen.

[21] Recent comments of the House of Representatives Committee on Energy and Commerce confirm the above conclusion. Its report dated July 16, 1984, addressed the CERCLA's relationship to other law and the then pending bill's (H.R. 5640) repeal of the preemption provision:

> *"The Committee believes that the proper interpretation of current law is that its preemption provision was intended only to preclude states from imposing taxes or otherwise requiring contributions to*

If Congress had intended section 114(c) to perform the broad preemptive purpose alleged by appellants it would have explicitly drafted that section to do so. For example, Congress could have made section 114(c) read as follows:

> "Except as provided in this chapter, no person may be required to contribute to any fund the purpose of which is to pay for any costs of response or damages or costs which may be compensated under this subchapter."

The insertion of the "compensation for claims" language in section 114(c) was a conscious choice by Congress to ensure that preemption be narrow in scope and not unduly restrict the states' capability to fund response actions.

C. State Funds Used For Any Purpose Not Specified in Section 114(c) Including State Response Costs, Are Not Preempted

Expenditures by states for any purposes other than those expressly restricted by section 114(c) are not preempted.[22] There-

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> *funds which would pay costs or damages that would be actually compensated by Superfund.* To avoid any possible misinterpretation of the law which could further restrict the states' efforts to raise the funds necessary to meet their matching share obligation under the program, the legislation repeals the current law's preemption provision in its entirety. [H.R. Rep. No. 890, Part 1, 98th Cong., 2d Sess. 58-59 (1984) (emphasis added).]" See also S. Rep. 99-11, 99th Cong., 1st Sess. 59-60 (1985).
>
> Congress is clearly attempting to clarify its intent in enacting this statute and such attempts should be accorded due consideration.

[22] Appellants arguments against the suggestion that section 114(c) preempts only state funds used to pay third party claims for costs or damages or any other compensable items is unsupported by legislative history or a plain reading of section 114(c).

The first argument apparently assumes that if states can be claimants under CERCLA, they cannot maintain their own special funds. On its face, this argument is unworkable. It is unimportant whether the state can assert a claim against Superfund for specified costs of response taken by the state or damages suffered by the state, and still maintain its own fund to pay third party claims against the state fund. There is no nexus between the payment of the state claim by Superfund and the payment of the third party claim by the state. Senator Randolph

fore, states may establish funds to be used for a broad range of response actions whether undertaken in cooperation with the federal government pursuant to section 104 or alone.

The legislative history reveals a number of additional purposes for which a state can collect taxes for funds to be used when the costs are not compensable under Superfund. (See 126 Cong. Rec. S 14981 (daily ed. Nov. 24, 1980) (remarks of Sen. Bradley and Sen. Randolph).) States can use their funds to provide an initial response to a hazardous waste release and thereafter seek reim-

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recognized that and characterized it as "a question of bookkeeping rather than a subject or preemption."

The second argument relies upon section 114(b)'s prohibition against double recovery. Nothing however in the Solicitor General's position supports the possibility of a double recovery,

The third argument is that under the New Jersey system, the New Jersey Department of Environmental Protection is compelled by state law to present claims for compensation to an independent state official who is the administrator of the New Jersey spill fund. Appellants suggest that the Solicitor General's argument is tenuous because Congress could not have intended the preemptive effect of Section 114(c) to rely upon the administrative mechanisms adopted by the states for the purposes of paying response costs—i.e. whether the state agency has to file a claim in writing or whether it can make direct withdrawals without so filing. As amici have demonstrated the question of whether there is a claim for compensation is only an initial inquiry. The claims must also not have been actually paid by Superfund. The internal state mechanism for payment of state costs is of little significance.

Finally, the appellants complain that the Solicitor General's approach "would leave the States free to create special funds of unlimited size and allow them to pursue cleanup wholly outside of the framework of CERCLA." (App. Br., p. 32.) The ability of states to create special funds for response costs is not unique to the Solicitor General's argument but is an integral part of CERCLA. Futhermore, cleanups are not likely to occur outside of the framework of CERCLA since the cost recovery provisions under section 107 are a powerful incentive to ensure that response activities by the states are in conformance with the NCP and therefore in furtherance of CERCLA's goals.

For the above reasons, appellants have failed to rebut the general reasoning of the argument initially advanced by the Solicitor General and expanded by amici.

bursement from Superfund. States may also set up funds to cover all costs of a cleanup in the event that the state, in fact, is not reimbursed by the federal fund. If the federal government does not reimburse the state for its claim—reimbursement is neither guaranteed or automatic—no claim has been paid under CERCLA and the state is free to cover such costs from whatever source. There is also the possibility that the federal government will not complete federal cleanup at a site before moving to another site. The Senators expressly noted that state funds could be used to complete the cleanup efforts at the first site. The state fund could also be used for the ten percent cost share required by CERCLA. Clearly, section 114(c) was drafted to protect a narrow concern and was not designed to impede accomplishment of a principal goal of CERCLA—rapid cleanup of hazardous waste sites.

III

STATE CLEANUP PROGRAMS WHICH ARE FUNDED BY TAXES WHICH ARE NOT DUPLICATIVE OF THE CERCLA TAX ARE NOT PREEMPTED

Assuming, arguendo, that this Court finds that some preemption may be warranted, such a finding should not broadly extend to state programs which are funded by special taxes which are different than the CERCLA tax.

Congress historically has recognized the high degree of specificity it must employ in preempting state taxing programs, conforming the scope of preemption with the specific problem which gave rise to its need. While appellants seek a broad preemption finding, their concern is only with state funds which are supported by taxes on the same products which financed Superfund. They contend that Congress recognized that every cleanup cost or damage claim could be or should be compensated by funds drawn from *special taxes on oil and chemicals* during the first five years of CERCLA that it imposed limitations upon States embodied in Section 114(c). Any preemptive effect of CERCLA should be in keeping, therefore, with the federal purpose sought to be protected.

The principal case asserted by appellants in support of their preemption argument cautions against the overbroad preemption of state taxing schemes. In *Aloha Airlines v. Director of Taxation,* 464 U.S. 7 (1983), this Court permitted preemption only of a particular kind of tax on an industry affecting interstate commerce.

As a general principle, where it is argued that Congress intended to withdraw police power or taxing power from a state by enacting a federal regulatory or taxing scheme, that intention must be explicit. (See *Ray v. Atlantic Richfield Co.,* 435 U.S. 151 (1978).) This is particularly true where federal preemption would upset historic federal-state relationships such as the protection of public health and safety. (See *United States v. Bass,* 404 U.S. 336 (1971).)

As argued by appellants, section 114(c) of CERCLA preserves the Congressional desire to limit the tax that could be imposed on the oil and chemical manufacturing industries so that they would suffer no competitive disadvantage in the international marketplace or cause domestic consumers to pay sharply higher prices. Assuming that to be the case, there is absolutely no indication, explicit or otherwise, that Congress intended to preempt a state tax on the generation of hazardous wastes or any other tax that is not identical in scope to federal Superfund tax. The legislative history is consistent with this position. As noted earlier, Senator Randolph stated that the preemption provision of CERCLA is "a prohibition against double taxation for the same purposes . . ." and that "this preemption provison is narrow in scope and limited to the particular purpose of preventing double taxation" (126 Cong. Rec S 14981 (daily ed. Nov. 24, 1980).) There can be no double taxation in situations where taxing schemes are entirely different and the categories of parties obligated to pay taxes are not the same.

Under CERCLA, the federal Superfund is supported by a tax on petroleum products (see 42 U.S.C. § 4611) and a tax on certain listed chemicals. (See 42 U.S.C. § 4661.) In essence, it is a feed stock tax imposed on manufacturers or producers of these hazardous substances. Many states, in creating their response funds, have devised entirely different taxing mechanisms to support their funds. For example, in the State of California, the Hazardous Substance Account is funded by a tax based upon the disposal of hazardous and extremely hazardous wastes. The tax rate is based upon the total amount in tons of hazardous waste disposed of in a given one-year period. The persons liable for the tax are every person who submitted for disposal offsite, or who disposed of onsite, more than 500 pounds of hazardous waste during the preceding calendar year.[23] Such a taxing system does not reach, as a category of taxpayers, the same persons or the same products covered by CERCLA. Therefore, the State of California system and others like it are not duplicative of the federal Superfund nor can they be characterized as creating "double taxation." The mere fact that some persons, as a result of two wholly different activities, can be subject to both tax systems does not create the double tax problem which Senator Randolph sought to avoid.

Therefore to the extent that this Court finds that any preemption is authorized by CERCLA, it is only those state response funds which impose a taxing mechanism on the same category of persons as CERCLA that should be affected by the Court's decision.

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[23] The following persons are liable for the tax pursuant to California Health and Safety Code Section 25342:

a. persons who dispose of hazardous waste generally;

b. persons who dispose of extremely hazardous waste generally;

c. persons who dispose of hazardous waste into in injection well or landfill;

d. persons who place hazardous or extremely hazardous wastes into surface impoundments;

e. persons who dispose of hazardous or extremely hazardous waste from extraction, beneficiation, and processing of ores and minerals.

CONCLUSION

The decision of the Supreme Court of New Jersey should be affirmed for reasons set forth above.

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Respectfully submitted,

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